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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 253.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

RUFUS E. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

PETITION FOR REHEARING.

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ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

PETITION FOR REHEARING.

Appellant respectfully requests a rehearing herein.

The opinion of the court filed October 12, 1959, did not state the reason or ground upon which the appeal herein was dismissed and we are left to conjecture on that point.

However, since appellant's Jurisdictional Statement set out the provisions of the appeal statute upon which the

appeal and the jurisdiction thereof is based (Title 28, U.S.C., Section 1257 [1] [2]) and the questions in the case as shown by the Jurisdictional Statement are those referred to in that statute, and since appeal is a matter of right where such questions are substantial (*Ireland* v. *Woods*, 246 U.S. 323, 328), we can only assume that the appeal was dismissed because the court believed the federal questions involved in the appeal are not substantial. Perhaps we did not discuss that question in the Jurisdictional Statement at as great length or as sufficiently in connection with the merits as we should have, for we are confident that the federal questions are substantial.

As this court said in *Milheim* v. *Moffat Tunnel Dist.*, 262 U.S. 710, 716-17, where the federal question presented is one requiring analysis and exposition for its decision it is not frivolous, and we believe that statement certainly applies to the federal questions involved in the present case.

The Kansas Mortgage Registration Law (G.S. 1949, 79-3102 to 3107) and Its Application to Appellant's Mortgages Violates the Due Process Clause of the Fourteenth Amendment.

The Kansas mortgage registration statute involved, which is set out in full in the appendix to the Jurisdictional Statement, provides by Section 79-3107 thereof as follows:

> "Any mortgage of real property executed on or after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceeding, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in or by any court in this state."

It has been held by the Supreme Court of Kansas that the failure to pay the tax provided by the mortgage registration law does not invalidate the obligation created by the mortgage. (*Fowler* v. *Moore*, 147 Kan. 108, 75 P.2d 222; *Lewis* v. *Independence Hotels Co.*, 150 Kan. 840, 96 P.2d 605.) So, involved in this appeal are two mortgages which were issued under the authority of the reorganization court, a federal court of competent jurisdiction, which were perfectly valid obligations but which the recording officials refused to record, and which courts will, under the statute, refuse to enforce, without the payment of a tax not required by the federal law or the federal court, and notwithstanding the federal court ordered them recorded upon payment of the filing and recording fees only, which were paid. We, therefore, have here the anomaly of a right without a remedy. This is in violation of due process of law under Section 1 of the Fourteenth Amendment.

It is not within the power of a state to take away all remedy for the enforcement of a right. (*Poindexter* v. *Greenhow*, 114 U.S. 270.) And although probably reasonable conditions may be imposed on the exercise of the remedy they may not be imposed when they are onerous and excessive as here. (*Ex parte Young*, 209 U.S. 123.) Also, while a legislature has general power, of course, to prescribe rules of evidence, it does not have the power to, and cannot under due process of law, establish rules which, under the guise of regulating the presentation of evidence, altogether prohibit a party from exhibiting his rights and all of the facts bearing upon the issue (*Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U.S. 35, 43; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 82), which is what G.S. 1949, 79-3107, does here. This is not the situation of a statute changing the rules of evidence by creating pre-

sumptions or a different period of limitation, or shifting the burden of proof, or making certain evidence *prima facie* evidence, which is held to be permissible, but is a situation where no evidence of the subject of the action may be introduced, which is quite different and is not permissible.

This court has further held that "the due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved," and that "that includes the right to introduce evidence and have judicial findings based upon it." (*B. & O. R. Co. v. United States*, 298 U.S. 349, 368-9.) That is not permitted under the mortgage registration law since it does not permit evidence of the obligation of the mortgages to be introduced.

The obligations under the two railroad mortgages in question will presumably be held by hundreds, perhaps thousands, of persons who, if the statute be held applicable here, could not enforce their security without the payment of a mortgage registration tax not required by the federal law, the Interstate Commerce Commission or the federal court authorizing the security. Such denial of access to the courts cannot be justified.

> "The Fourteenth Amendment undoubtedly intended * * * that all persons * * * should have access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts." (*Barbier v. Connolly*, 113 U.S. 27, 31.)

See, also, *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230.

Even if the mortgage registration statute is not unconstitutional on its face, we have contended at all times in

this case that its application to appellant's mortgages was unconstitutional and therefore invalid. This contention is in accordance with the rule set forth in *Poindexter* v. *Greenhow*, 114 U.S. 270, where it was said at page 295:

> "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

And in *Fiske* v. *Kansas*, 274 U.S. 380, it is stated at page 385:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Sec. 237 of the Judicial Code. *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow* v. *Krinsky*, 259 U.S. 503, 510; *Cudahy Co.* v. *Parramore*, 263 U.S. 418, 422. And see *St. Louis, etc., Railway* v. *Wayne*, 224 U.S. 354, 359."

There is another important matter we should call to the attention of the court. As the record shows and as we

pointed out in our Jurisdictional Statement, the mortgages were a part of the reorganization proceedings under the bankruptcy act and the issuance of them was a part of the reorganization plan and proceedings. Not only did the federal court order them recorded under statutory authority (11 U. S. C., Section 205f), but a Kansas statute entirely apart from the mortgage registration law provides for the recording *upon payment of recording fees* of all orders and decrees "or other paper" in bankruptcy proceedings, the statute providing as follows:

> "The register of deeds of any county wherein is located any land in which a bankrupt or a debtor in any proceeding under the act of congress relating to bankruptcy has any interest shall receive for record and record a certified copy of any pleading, decree, order or other paper, filed in said proceeding, which any act of the congress of the United States provides may be recorded in the records of such a county. Such record shall impart notice to all persons of such bankruptcy proceeding and of the contents of said certified copy, which shall be recorded and indexed in the record of deeds in the office of said register in the name of the bankrupt or debtor as grantor and in the name of the trustee or receiver in bankruptcy or other person (if any) to whom said interest or any part thereof may pass by virtue of law or of said decree, order or other paper as grantee. *Said register shall charge and collect the same fee for recording such a certified copy as is provided by law for recording a deed of the same length.*" (G. S. 1949, 67-901.) (Emphasis ours.)

Under that statute appellee Register of Deeds was required to record the two mortgages involved here, they being a part of the bankruptcy proceedings and being tendered to him for recording and the filing and recording fees being paid. This would also constitute the notice and evidence apparently contemplated by 11 U.S.C., Section 205(k).

Enforcement of the Kansas Mortgage Registration Law with Respect to Appellant's Mortgages Would Constitute a Burden on Interstate Commerce.

There is also involved in this appeal the question whether the enforcement of the Kansas mortgage registration law would constitute a burden on interstate commerce and an undue interference with the order of the federal reorganization court. The bonds and mortgages here involved were authorized and approved by the Interstate Commerce Commission under the provisions of 49 U.S.C., Section 20a, and the federal reorganization court under the bankruptcy statute, both obviously addressing themselves to the interstate commerce conducted by a common carrier in many states.

The reorganization court and the Interstate Commerce Commission had the authority, jurisdiction and right to, and did, order the old mortgages (which made the railroad bankrupt) discharged of record and the new mortgages involved here placed of record (see Consummation Order and Final Decree), so that the bonds secured thereby and issued as a part of the reorganization plan and proceeding to rehabilitate the railroad could be marketed, since nobody would knowingly buy a bond secured by mortgages not placed of record.

The case of *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission*, 183 Wis. 47, 197 N.W. 352, involves a similar situation to that here. There the Supreme Court of Wisconsin held:

> "Statutes requiring railroad engaged in interstate commerce to obtain the consent of the (Wisconsin) Railroad Commission to issuance of securities are superseded by Transportation Act, Sec. 20a (U. S. Comp. St. Ann. Supp. 1923, Sec. 8592a), prohibiting carriers from issuing securities without the authority

of the Interstate Commerce Commission, since under such statute Congress, through the agency of the Interstate Commerce Commission, has assumed exclusive control over such securities, in view of Sections 1 (17), 5 (6) c, 13 (4), 20a (7) (Sections 8563, 8567, 8581, 8592a)." (Syl. par. 3.)

In the course of its opinion the court said:

"* * * *It is claimed that the (state) statute relied on by defendant was superseded by the federal statute and that is undoubtedly a federal question.*" (p. 355.) (Emphasis ours.)

Continuing the court said:

"The financial problem is constantly facing carriers. The great transportation corporations carrying on business between the states are the instruments of commerce. They are generally carrying heavy indebtedness. The ability to make provision for interest and principal as it matures is of vital importance. The inability to meet these obligations may lead, and often has led, to deterioration of the physical properties, and to disaster and bankruptcy, causing inefficiency in the service due to the general public."

* * *

"When state Legislatures undertake to restrict the power of carriers doing an interstate business to raise money vitally necessary for carrying on their commerce between the states, that legislation is dealing with an instrumentality of commerce." (p. 358.)

The Supreme Court of Kansas Held in Effect That 11 U.S.C., Section 205(f) and the Federal Reorganization Court's Order Issued Thereunder Were Invalid and Disregarded Them.

The Consummation Order and Final Decree of the federal reorganization court by Section 10.04 thereof or-

dered and required that all recording officers should record all documents provided by the order (which, of course, included the two mortgages) upon payment of the proper recording and filing fees, "the laws of any state to the contrary notwithstanding." This order was in accordance with 11 U.S.C., Section 205(f), which requires that such orders be carried out, "the laws of any state or the decisions or order of any state authority to the contrary notwithstanding."

However, the appellee Register of Deeds refused to comply with that order notwithstanding the recording and filing fees were paid, and required the payment of the mortgage registration tax before he would record the mortgages.

The Supreme Court of Kansas held that the reorganization court did not order the mortgages recorded without payment of the registration tax and that it did not have the authority to do so, and disregarded the order. Thus both the applicability and the validity of both the order and the statute upon which it was based, which was an issue in the case, was passed upon adversely and the order was disregarded, which presents here a substantial federal question.

The decision of the Supreme Court of Kansas was premised upon the holding that the reorganization court "did not order, *and did not have the authority to order,* that no mortgage registration fees or taxes be paid." (*Missouri Pacific Railroad Co.* v. *Deering*, 184 Kan. 283, 336 P.2d 482, Syl. par. 1[a].) Actually the reorganization court's order did not contemplate or have anything to do with the payment of taxes upon the mortgages. That order was a directive more general in scope than merely one to record specific mortgages. Its directive

was that all recording officers of recording districts (including parishes and cities, states and counties) should file and record the *order* itself and *"all documents the execution of which is directed in this order"*—all part of the reorganization plan itself—*the laws of any state to the contrary notwithstanding* and this necessarily must be interpreted to include any law providing for a *condition precedent* to such filing and recording, as is provided by G.S. 1949, 79-3102 to 79-3107. This is very different from an order that no taxes to which they may be subject shall not be paid, especially since the law contemplates that they shall be paid by the *mortgagees* and not the mortgagor, such as appellant. An examination of the Order of Consummation and Final Decree will show that it provides for the satisfaction and release of pending mortgages, amendments to the articles of incorporation, deeds, and other instruments, as well as the new mortgages which alone were subject to a tax. These instruments, including the mortgages and the order itself, were filed and recorded in all of the 60 counties in Kansas where the property is located, in accordance with the requirement of Section 10.04 and as probably contemplated by 11 U.S.C., Section 205(k). As we have pointed out, appellee Register of Deeds was also required to file and record them under the provisions of another Kansas statute, G.S. 1949, 67-901, which provides for the recording of all papers constituting a part of bankruptcy proceedings.

The Federal Bankruptcy Law and the Interstate Commerce Act are the supreme law of the land (United States Constitution, Art. VI) and they take precedence over any state law. (*Stoll* v. *Gottlieb*, 305 U.S. 165; *Case* v. *Bowles*, 327 U.S. 92, 102; *R. F. C.* v. *Beaver County*, 328 U.S. 204, 206-7; *Morris* v. *Jones*, 329 U.S. 545, 553; *Seaboard R. Co.* v. *Daniel*, 333 U.S. 118.) The reorganization court's

orders issued under and based upon those laws accordingly became the law of the land and took precedence over any Kansas statute providing any condition precedent to carrying out such orders, such as the Kansas mortgage registration law. The order here was made by the reorganization court specifically under the provisions of Section 205(f) of the bankruptcy law (11 U.S.C., Section 205f). Applying the language of this court in *Conner v. Long*, 104 U.S. 228, 240, the part of the bankruptcy law here involved "is as truly the law of each State, as it is, and because it is, a law of the United States." Thus, the bankruptcy law "is as truly the law" of Kansas as is the mortgage registration law, with the difference that the bankruptcy law is the supreme law of the land—the supreme law of Kansas. Appellee Register of Deeds and the Supreme Court of Kansas ignored both the federal statute and the Consummation Order and Final Decree issued thereunder (as well as G.S. 1949, 67-901) and did not recognize the supremacy of the federal law. It seems clear that this presents a substantial federal question.

We respectfully submit that substantial federal questions are presented by this appeal and request a rehearing herein and reconsideration of the order dismissing this appeal.

We further contend that if an appeal is not allowed then a writ of certiorari should issue because of the importance of the federal questions involved. As we pointed out in our Jurisdictional Statement there can be no question that a right, privilege and immunity under a statute of and authority exercised under the United States was specially set up in this case, and we believe certiorari should be granted under the authority of the decisions cited on page 13 of our Jurisdictional Statement. The fact that the state court's ruling disregarded

the order and decree of the federal court also justifies the granting of certiorari. (*Stoll* v. *Gottlieb*, 305 U.S. 165.)

Respectfully submitted,

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CERTIFICATE.

I hereby certify that the above and foregoing Petition for Rehearing is filed and presented to the court in good faith and not for the purpose of delay.

Ralph M Hope